State of West Virginia

No. 31679 – *State of West Virginia v. Marybeth Davis*

(Filed December 23, 2004)

Starcher, J., dissenting:

I believe that the majority opinion has used too strict a standard for reviewing the proffered new evidence in the instant case.

The majority opinion (at footnote two) concludes that the new evidence that the appellant seeks to use in a new trial is at best "cumulative," and therefore cannot serve as the basis for a new trial award.

In my judgment, in a close case based entirely on circumstantial evidence, the fact that new evidence is "cumulative" is not itself fatal to a claim seeking a new trial. Sometimes it is precisely the "accumulation" of evidence that can tilt the scales of justice to the point of establishing reasonable doubt.

I would hold, therefore, that when a court concludes that new evidence, even if it is cumulative, might well tip the balance in favor of a criminal defendant by establishing reasonable doubt, and the evidence otherwise meets the standard for a new trial award, the court should order a new trial.

I would reverse and remand for consideration under this standard.